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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SAM GHADRDAN, Plaintiff and Respondent, v. ALEX GORABI et al., Defendants and Appellants.	B210895 (Los Angeles County Super. Ct. No. BC350052)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Robert L. Hess, Judge. Affirmed.

Law Office of Jeanne Collachia and Jeanne Collachia for Defendants and Appellants.

Schwartz, Wisot & Wilson and John D. Wilson for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of DISCUSSION, parts A, C, D and E.

INTRODUCTION

Defendants and appellants Alex Gorabi and Angelino Men's Wear, Inc. (defendants)[1] appeal from a monetary judgment entered against them and in favor of plaintiff Sam Ghadrdan (plaintiff) after a jury trial. In the published portion of this opinion, we hold that the trial court did not abuse its discretion when it excluded evidence of a plea agreement and conviction of a corporation, of which plaintiff was the chief executive officer and sole shareholder, to impeach plaintiff and show plaintiff's motive and knowledge. In the unpublished portion of this opinion, we reject defendants' other contentions. We therefore affirm the judgment.

FACTUAL BACKGROUND

This litigation arose out of a longstanding business relationship between plaintiff and defendant that originally involved a textile business. Plaintiff financed the business and defendant handled the day-to-day operations. At some point, the original business became a men's clothing business that, among other things, purchased a parcel of commercial property. In 2006, a dispute arose over the ownership of the clothing business and the commercial property. As a result, plaintiff sued defendants alleging multiple causes of action, and the case proceeded to a jury trial. After a lengthy trial, the jury returned a verdict in favor of plaintiff on his breach of oral contract cause of action in the amount of $2,396,404.50. Plaintiff did not obtain further relief on any of his other claims.

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[1] We refer to Alex Gorabi and Angelino Men's Wear, Inc. collectively as defendants, but refer to Alex Gorabi in his individual capacity as defendant. We refer to the corporate defendant and appellant as Angelino Men's Wear.

DISCUSSION

A. Order Denying Motion for Summary Adjudication

Defendants contend that the trial court erred when it denied their motion for summary adjudication of plaintiff's breach of oral contract claim, which motion was based on the statute of limitations. Plaintiff counters that because the jury determined the statute of limitations defense against defendants after trial on the merits, defendants cannot show on appeal the requisite prejudice from the trial court's ruling on the summary adjudication motion. We agree with plaintiff.

Defendants filed a summary adjudication motion asserting, inter alia, that plaintiff's breach of oral contract cause of action was barred by the statute of limitations. In denying defendants' motion, the trial court found that there were "triable issues of material fact . . . and that the motion must be denied in its entirety for that reason. Such triable issues include the following: [¶] 1. Whether the Doctrine of Estoppel bars Defendants from raising the Statute of Limitations as a defense; . . . ."

At trial, plaintiff provided testimony on direct examination to support his argument that defendants were equitably estopped from asserting the statute of limitations defense. As discussed below, the jury found in favor of plaintiff on this issue, rendering any purported error in the denial of the summary adjudication motion harmless.

Plaintiff testified on the equitable estoppel issue as follows: "Q. And can you tell me, did you have any discussion with [defendant] with respect to him giving you a series of checks? A. Yes. Q. And do you recall what was said? A. Yes, I told [defendant] that I invest so much money in the company and I need to be repaid for initial investment and also the promissory note and I told [defendant] if I do not receive a payment I have to see a lawyer. Q. This was at the end of – what did you say 2000? A. 2000. Q. And do you recall whether [defendant] said anything in reply to you? A. Yeah, [defendant] says 'come on, we are partners, don't go to lawyers. The business is getting stronger and I will pay for the promissory note initial investment just have patience with me.' And that's why [defendant] gave me 15 checks. [¶] . . . [¶] Q. Was this the first time that you

and [defendant] had discussed your wanting to be repaid? A. No. Q. Had you talked about it before then? A. Yes. Q. And can you recall what was said in any prior conversation? A. Same things. I told [defendant] that I spent so much money and so much time had passed and he didn't make any payment and basically the discussion started around 2000. Q. And were there any discussions after the second discussion that you just testified about? A. Yes. Q. Can you estimate how many discussions you had with [defendant] where you were wanting to be repaid? A. I can't give you exact number, but like once a month or so, I would bring up the conversation with [defendant] that I have to be paid for initial investment and promissory note and [defendant] all of the time says 'have patience with me business is getting stronger and I will pay you.' [¶] . . . [¶] Q. And can you tell me – you said starting in 2000 you had these conversations with [defendant], when do you think the last of these conversations was? A. 2000 it started and then until end of 2005. [¶] . . . [¶] Q. And did you have any conversation with [defendant] in connection with receiving this check? A. Yes. Q. Do you recall what was said? A. Yes, I told [defendant] that I had a conversation with [defendant] and I told him that I need to be paid for promissory note and also the initial investment and I told him he doesn't leave me any choice other than to see an attorney. That's why he paid this check to me. Q. Okay. Did he say anything in connection with your statement to him that you would need to see an attorney? A. Constantly he says 'don't use an attorney, the business is getting better and I will pay you all money for promissory note and initial investment.' [¶] . . . [¶] Q. Now, did you ever have a conversation with [defendant] in January of 2006? A. Yes. Q. Do you recall what [defendant] said to you? A. [Defendant] in January of 2006 says he was not recognizing my interest in [Angelino Men's Wear, Inc.] and also in 1006 South Olive Street and he says the real reason that he then took Kansas City to allow the statute of limitations run on my claim against him. And he says I am not anymore welcome to [Angelino's Men's Wear, Inc.] and he said that he visit attorney and the attorney told him that all of those claim[s] were bare [*sic*] by a statute of limitations. . . . Q. And what, if anything, did you say to [defendant] after he made these statements to you? A. I told him we were partner[s] and

he could [not] do this to me. Q. And what, if anything, did he say to you in response? A. He said that I don't have no case against him repeatedly and I told him that he had been asking me in 2005 even for additional fund that I gave him and he didn't care."

Plaintiff's testimony, when read in a light most favorable to the verdict,[2] supported a reasonable inference that defendant induced plaintiff to refrain from retaining an attorney—i. e., taking legal action—by making repeated promises to repay plaintiff as business improved and by giving him some checks. And, plaintiff's counsel emphasized that point to the jury during argument as follows: "Now I touched on the statute of limitations defense, but I want to spend a little more time with it. . . . [¶] The law recognizes that if you have been persuaded not to file a timely action, the persuader, that is the person who made you not take action, cannot use the statute of limitations against you. It is called estoppel. Why? Because it is inequitable to lead a person to believe that one thing is true, and then try to squirrel with it later by claiming a technical offense. And that is exactly what [defendant] is trying to do in this lawsuit. [¶] I hope that you all remember the depth of the testimony of [plaintiff] that starting in the year 2000, he was constantly hounding [defendant] to pay monies telling him that he would need to go to a lawyer, and what did [defendant] constantly tell him? He pacified him. He said we are partners. Don't go to a lawyer. Everything is going to be okay. Please don't go to a lawyer. This conversation happened over and over again. And then he pacified him in a much more material way; he gave him some checks, Exhibit 17. He wasn't able to cash them all only able to cash a couple. [¶] If you think about it, if your choice is go file a lawsuit right now, or wait a minute, this guy just gave me a bunch of checks. Maybe he is actually going to pay me; maybe I am going to get what I am entitled to. Any reasonable person along with being pacified with given these checks, they wouldn't go running to the courtroom right then. They would think this is okay. Maybe this is going

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[2] On appeal, "we must view the evidence in the light most favorable to the verdict and presume the existence of each fact that a rational juror could have found proved by the evidence. [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 139-140, fn. 30, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

to work out because, you know, what is the worst thing that can happen? You can end up in this lawsuit. It is a lot better to have things resolved by themselves. [¶] [Plaintiff] didn't want to go running to the courthouse. That is pretty obvious because he waited until, you know, the conversation of January 2006 where everything became really crystal clear. [¶] I think what I would ask you to consider with respect to the statute of limitations is that [defendant] never took the stand and denied what [plaintiff] said. That all these conversations which he said were occurring on a monthly basis, he never came out and said, I never talked to him. That didn't happen. We never had a conversation like that. Again, a person who truly believed that those conversations didn't occur, they would be telling you so on the stand. [¶] And I submit that the failure to do that is something where you have got to say to yourself, well, what is the only evidence here? I have got all these conversations that [plaintiff] testified about and nobody has contradicted those. [¶] It seems to me that this is a perfect case to say the statute of limitations should not be used by [defendant] because he is the one who persuaded, through many different acts, [plaintiff] not to file this lawsuit until he did in January of 2006."

Following argument, the jury returned the special verdict form and answered the following questions concerning the statute of limitations defense. "1. Did [defendant] and [plaintiff] enter into one or more oral agreements commencing in 1994, with respect to funding and operation of the entity known as Hollywood Studio Accesori, Inc. ("HSA")? Yes. . . . [¶] . . . [¶] 4. Did all the conditions occur that were required for [defendant's] performance? Yes. 5. Did [defendant] fail to do something that the contract required him to do? Yes. 6. Was [plaintiff] harmed by that failure. Yes. 7. Do you find that this claim is barred by the statute of limitations? *No*. [¶] . . . [¶] 27. Did [defendant] have a fiduciary duty to [plaintiff]? Yes. 28. Did [defendant] breach that fiduciary duty? Yes. 29. Was [plaintiff] harmed by that breach of fiduciary duty? Yes. 30. Was [defendant] a substantial factor in causing [plaintiff] harm? Yes. 31. Do you find that this claim is banned by the statute of limitations? *No.*" (Italics added.)

Based on plaintiff's testimony, the arguments of his counsel, and the special verdict form, it is undisputed that the jury considered the statute of limitations defense, including the equitable estoppel issue, and determined that defense adversely to defendants, i.e., the jury implicitly found that defendants were equitably estopped from asserting the statute of limitations such that the oral contract and breach of fiduciary duty claims were not time barred.[3] Notwithstanding that determination, defendants argue that we should review the trial court's *prior* order denying his motion for summary adjudication of the oral contract claim, which motion was based on that same statute of limitations defense. In doing so, defendants urge us to reverse a final judgment rendered after a trial on the merits based on an asserted error in a *pretrial ruling* of the trial court.

It is well established that when an issue is fully litigated and determined adversely to a party after a trial on the merits, that party may not challenge on appeal the propriety of a previous order denying that party summary judgment or adjudication of the same issue. "If a trial court denies summary judgment or adjudication because it erroneously concludes that disputed issues of material fact exist, and those issues are resolved against the moving party at a trial on the merits, the error in denying summary judgment 'cannot result in reversal of the final judgment unless that error resulted in prejudice to defendant.' (*Waller v. TJD, Inc*. (1993) 12 Cal.App.4th 830, 833 [16 Cal.Rptr.2d 38] [(*Waller*)]; see also *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc*. (2007) 148 Cal.App.4th 682, 689 [56 Cal.Rptr.3d 92] [denial of summary judgment not prejudicial where jury later resolved fact issues adversely to moving party].) The applicable standard of prejudice is that described in article VI, section 13 of the California Constitution: a judgment cannot be set aside 'unless, after an examination of the entire cause, including the evidence, the

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[3] Defendants note that the jury instructions are missing from the court file. And the reporter's transcript omits the reading of the instructions to the jury. The absence of a reporter's transcript or a settled statement concerning those proceedings is another basis to reject plaintiff's contentions on this issue. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; California Rules of Court, rules 8.120, 8.130, 8.134, 8.137.)

court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13; see *Waller v. TJD, Inc., supra*, 12 Cal.App.4th at p. 833.)" (*Safeco Ins. Co. of America v. Parks* (2009) 170 Cal.App.4th 992, 1002-1003 (*Safeco*).)

Prior to trial, the trial court determined that the issue of whether defendants were equitably estopped from asserting the statute of limitations defense was a disputed factual issue and, on that basis, denied defendants' summary adjudication motion on the oral contract claim. Thereafter, the issue was litigated at trial and decided adversely to defendants. As a result, defendants cannot show the requisite prejudice from the order denying their summary adjudication motion and, therefore, cannot prevail on an appeal from that order.

Defendants cite to our decision in *Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257 (*Gackstetter*) and argue that this case falls within the limited exception recognized in that case. But, as the court in *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc., supra,* 148 Cal.App.4th at pages 688-689 explained, "In *Gackstetter*, the defendants unsuccessfully raised a defense of good faith settlement under Code of Civil Procedure section 877.6 in their summary adjudication motion. On appeal, the defendants argued the trial court erred in denying their summary judgment motion. *Gackstetter* accepted *Waller*'*s* conclusion that a reviewing court will not consider whether a trial court erred in denying a summary judgment motion based on triable issues of fact following a full trial of those same issues. (*Gackstetter*, at p. 1268.) The court explained: '"A decision based on less evidence (i.e., the evidence presented on the summary judgment motion) should not prevail over a decision based on more evidence (i.e., the evidence presented at trial)."' (*Id.* at p. 1269 quoting Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (2004) ¶ 8:168.10, p. 8-114.) *Gackstetter* nonetheless reviewed the trial court's denial of summary judgment because the good faith issue was not based on disputed facts that were resolved at a subsequent trial. The court recognized the good faith settlement issue could have been raised in a number of different ways, and the defendants had not forfeited review merely

because they chose summary judgment as the procedural device to assert their good faith settlement defense. (*Gackstetter*, at p. 1269.)"

Unlike the procedural posture in *Gackstetter, supra,* 135 Cal.App.4th 1257, in which the good faith settlement issue was not resolved at trial, the equitable estoppel issue here was litigated at trial and resolved by the jury. Thus, this case does not fit within the exception recognized in *Gackstetter* and instead is governed by the general rule that an error in denying a motion for summary judgment or adjudication cannot "result in reversal of the final judgment unless that error resulted in prejudice to defendant." (*Safeco, supra*, 170 Cal.App.4th at pp. 1002-1003.) As we have concluded, defendants cannot demonstrate prejudice or a miscarriage of justice here because the equitable estoppel issue was resolved against them at trial after a full and fair opportunity to litigate it.

In their reply brief, defendants, for the first time, contend that the evidence *at trial* was insufficient to support a finding that they were equitably estopped from asserting a statute of limitations defense. This is a new assertion that raises an issue different from the issues raised in the opening brief regarding the denial of defendants' summary adjudication motion. As a general rule, """'points raised in the reply brief for the first time will not be considered [on appeal], unless good reason is shown for failure to present them before. . . .'"" (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.) Although defendants have not provided any good reason for their failure to raise the substantial evidence issue in their opening brief, it is arguable that defendants' new contention was raised in the reply brief because plaintiff asserted in the respondent's brief lack of prejudice as a result of what occurred at trial. Therefore, we will consider defendants' substantial evidence argument as it relates to the statute of limitations issue.

The law governing the doctrine of estoppel in the context of a statute of limitations defense is well established. "Under appropriate circumstances equitable estoppel will preclude a defendant from pleading the bar of the statute of limitations where the plaintiff was induced to refrain from bringing a timely action by the fraud, misrepresentation or deceptions of defendant. [Citations.] A defendant should not be permitted to lull his

adversary into a false sense of security, cause the bar of the statute of limitations to occur and then plead in defense the delay occasioned by his own conduct. [Citations.]' (*Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240, 245 [195 Cal.Rptr. 58].) ¶] . . . [¶] 'It is well settled that where delay in commencing an action is induced by the conduct of the defendant, he cannot avail himself of the defense of the statute [of limitations]. [Citations.]' (*Gaglione v. Coolidge* (1955) 134 Cal.App.2d 518, 527 [286 P.2d 568]; see also *Rupley v. Huntsman* (1958) 159 Cal.App.2d 307, 313 [324 P.2d 19]; *Langdon v. Langdon* (1941) 47 Cal.App.2d 28, 32 [117 P.2d 371]; *Industrial Indem. Co. v. Ind. Acc. Com.* (1953) 115 Cal.App.2d 684, 689 [252 P.2d 649]; *Carruth v. Fritch* (1950) 36 Cal.2d 426, 434 [224 P.2d 702, 24 A.L.R.2d 1403].) As one court observed: 'The equitable doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. [Citations.] A person by his conduct may be estopped to rely on the statute. Where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense. [Citations.]' (*Industrial Indem. Co. v. Ind. Acc. Com., supra,* 115 Cal.App.2d at p. 689, italics in original; see also *McDonagh v. Gourneau* (1969) 2 Cal.App.3d 1033, 1039 [83 Cal.Rptr. 63].)" (*Ateeq v. Najor* (1993) 15 Cal.App.4th 1351, 1356-1357; see 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, §§ 763-767, pp. 994-1002.) "'It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.] "[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law."'" (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925-926.)

Defendants assert that a mere request for delay or forbearance is not sufficient to raise an estoppel. But here, the evidence was that defendant asked plaintiff not to see a lawyer, and by inference, not to sue, based on representations to the effect that defendants would perform their contractual obligations and that the business in which they were

partners was improving. Defendants even gave plaintiff checks, which can be evidence in support of estoppel.[4] (*Young v. Sorenson* (1975) 47 Cal.App.3d 911, 914.) Thus, a reasonable juror could have inferred from plaintiff's testimony on the estoppel issue that he was induced by the representations and checks to defer commencing an action. And, defendants do not argue there was no reliance—only unreasonable reliance, i.e., a well-educated and sophisticated businessman like plaintiff would not have been induced by defendant's promises of performance to refrain from instituting a timely legal action. Whether the reliance was unreasonable is a question of fact. (See *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 [fraud]; *Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1069 [equitable estoppel question of fact].)

Based on the foregoing formulation of the equitable estoppel doctrine in the context of a statute of limitations defense, plaintiff's testimony on the issue—which defendants did not dispute— was sufficient to support the jury's[5] implicit finding that defendant was equitably estopped from relying on the statute of limitations defense. The existence of an estoppel was a factual issue for the jury to decide based on plaintiff's testimony. When that testimony is viewed in a light most favorable to the verdict (*People v. Rundle, supra,* 43 Cal.4th at pp. 139-140, fn. 30), it supports a reasonable inference that plaintiff refrained from taking legal action against defendants in reliance on defendant's repeated promises to repay plaintiff for plaintiff's investment in the business.

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[4] Some of the checks were cashed. Past performance would extend the accrual of the statute of limitations for an action on a promissory note. (See Code Civ. Proc., § 360.)

[5] Defendants also complain that the equitable estoppel issue should have been resolved by the trial court, not the jury, citing *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 155. But, defendants do not contend that this purported error requires reversal of the judgment, presumably because they acquiesced in the submission of the issue to the jury. Equitable issues submitted to a jury without objection are established by the jury verdict. (See *Duff v. Fisher* (1860) 15 Cal. 375, 379; see also *Snelson v. Ondulando Highlands Corp.* (1970) 5 Cal.App.3d 243, 259 [if a party allows an issue to be tried in equity without objection, that party cannot thereafter complain that the issue should have been tried as a law question].)

B. Exclusion of Plea Agreement and Conviction

Prior to trial, plaintiff made a motion in limine seeking to exclude evidence of a criminal conviction of Lynwood Bell Pharmacy, Inc. (the pharmacy) based upon a plea agreement between the pharmacy and the State of California (State). According to defendants, plaintiff was the "president, chief executive officer, director, agent for service of process, and shareholder" of the pharmacy. Under the plea agreement, the pharmacy acknowledged committing Medi-Cal fraud, agreed to plead guilty to one count of Medi-Cal fraud, and agreed to pay restitution and investigation costs. In his motion, plaintiff argued that evidence relating to the conviction and plea agreement was inadmissible as character evidence or for impeachment and, in any event, should be excluded under Evidence Code section 352 as more prejudicial than probative. According to the declaration of plaintiff's counsel, plaintiff was not the "principal" pharmacist at the pharmacy, and the principal pharmacist who operated the pharmacy during the misconduct in question was deceased at the time of the plea agreement.

Defendants opposed the motion, arguing that because the pharmacy could only act through plaintiff as its officer and director and plaintiff, as the sole shareholder of the pharmacy, was the only beneficiary of the fraud**,** the conviction could be used to impeach plaintiff. Defendants also contended that the plea agreement and the conviction constituted crimes and acts relevant to show plaintiff's knowledge of "how to present forged documents" and to show plaintiff's motive to lie about the asserted existence of certain promissory notes that were at issue between plaintiff and defendants.

The trial court granted the motion[6] on the grounds that "[t]he conviction is not plaintiff[']s, and is barred by [Evidence Code section] 352." On appeal, defendants

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[6] According to the parties, the reporter's transcript of the hearing on the motion in limine cannot be located notwithstanding defendants' notice of omission under rule 8.155(b)(1) of the California Rules of Court. The absence of a reporter's transcript or a settled statement concerning the hearing on the motion is another basis to reject defendants' contention on this evidentiary issue. (See *Maria P. v. Riles, supra,* 43 Cal.3d at pp. 1295-1296.)

contend that evidence of the plea agreement and conviction should have been admitted to impeach plaintiff and under Evidence Code section 1101, subdivision (b) as evidence of plaintiff's knowledge of how to alter documents and of his motive to fabricate documents and checks. Defendants, citing to the voir dire examination of the jurors, argue that the jury had negative views about defendant, and therefore evidence of plaintiff's character was necessary to counter those views.

Evidence Code section 351 states, "Except as otherwise provided by statute, all relevant evidence is admissible." Evidence Code section 787 states, "Subject to Section 788, evidence of specific instances of conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." Evidence Code section 788 specifies, "For purposes of attacking the credibility of *a witness*, it may be shown . . . that *he has been convicted of a felony* in certain circumstances." (Italics added.) Evidence Code section 1101, subdivision (b) provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." Finally, Evidence Code section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Whether the plea agreement and conviction of the corporation can be admissible at all against the plaintiff is a legal question. We review purely legal questions de novo. (See *People v. Louis* (1986) 42 Cal.3d 969, 986.) The trial court's decision to admit or exclude evidence under Evidence Code sections 352 and 1101 is reviewed for an abuse of discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602 ["'We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence

under Evidence Code sections 1101 and 352.' (*People v. Cole* [(2004)] 33 Cal.4th [1158,] 1195."**]**) To establish an abuse of discretion, the complaining party must show that "'the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].' (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 [82 Cal.Rptr.2d 413, 971 P.2d 618.)" *People v. Carrington* (2009) 47 Cal.4th 145, 195.)

The parties agree that there is no case law in California expressly dealing with the admissibility of a felony conviction of a corporation for use against an officer or shareholder of that corporation to either impeach the officer or shareholder in his or her individual capacity under Evidence Code section 788 or as evidence of knowledge or motive on the part of the individual under Evidence Code section 1101.

The plain language of Evidence Code section 788 allows evidence of a conviction to impeach a witness only when the witness himself or herself has been convicted of a felony. Notwithstanding similar language in Rule 609 of the Federal Rules of Evidence, it has been held that under that rule,[7] a party may use "a corporation's felony conviction to impeach the corporation's *vicarious* testimony." (*Hickson Corp. v. Norfolk Southern Ry. Co.* (E.D. Tenn. 2002) 227 F.Supp.2d 903, 907 (italics added); see *Olin Corp. v. Certain Underwriters at Lloyd's London* (2d Cir. 2006) 468 F.3d 120, 135; Jones, et al., Federal Civil Trials and Evidence (The Rutter Group 2009) ¶ 12:56.) One authority has noted, "A corporation's prior felony conviction *cannot* be used to impeach a corporate

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[7] Federal Rules of Evidence, rule 609 provides in pertinent part: "(a) General rule. For the purpose of attacking the character for truthfulness of a witness, [¶] (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and [¶] (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness."

employee's testimony when the employee *did not participate* in the underlying criminal conduct." (Jones, et al., Federal Civil Trials and Evidence, *supra*, at ¶ 12:56, citing *Walden v. Georgia-Pacific Corp.* (3d Cir. 1997) 126 F.3d 506, 523-524.) In *Elcock v. Kmart Corp.* (3d Cir. 2000) 233 F.3d 734, 751-754, the court suggested that the embezzlement convictions of an expert and the entity for which he performed services were admissible on the expert's credibility, but could be excluded if the trial court determined that the probative value was substantially outweighed by other factors. (Cf. *United States v. Trenton Potteries Co.* (1927) 273 U.S. 392, 404-405 [asking witness about knowledge of guilty plea by corporate employer to violation of antitrust law permissible to show bias].)

In *Oklahoma ex rel. Nesbitt v. Allied Materials Corp.* (W.D.Okla. 1968) 312 F.Supp. 130, 133-134, the court said that it was permissible for the state to use prior criminal antitrust convictions of corporations to impeach witnesses who were individually convicted of the same crime committed by the corporations and those witnesses who were managing agents, officers, or directors of the corporations. The court added that it did not believe "a conviction . . . would taint all employees of a corporation so as to make them subject to impeachment by reason of the conviction of their corporate employer." (*Id.* at p. 133.) To the extent the decision permitted the corporate convictions to be used against individuals—even of managing agents, officers or directors—who had no knowledge and no connection with the illegality, that decision has been criticized. (Friedlander, Using Prior Corporate Convictions to Impeach (1990) 78 Cal.L.Rev. 1313, 1314 (Friedlander).)

In *CGM Contractors, Inc. v. Contractors Environmental Services, Inc.* (W.Va. 1989) 383 S.E.2d 861, 865-866, the court in applying an evidentiary statute similar to the federal rule, said "it would seem reasonable to utilize a corporate crime to impeach a corporate official's credibility if the official is connected to the crime, so long as the conviction meets "certain evidentiary requirements of the evidence code." In *Commerce Funding Corp. v. Comprehensive Habilitation Services, Inc.* (S.D.N.Y. 2005) 67 Fed. R. Evid. Serv. 142, the federal court held that the corporation's conviction can be used to

impeach the chief executive officer of the corporation if there is a reasonable inference that the he had been directly connected to the criminal act. The court noted, "Unwittingly, the parties have stumbled onto an interesting evidentiary issue that has yet to be resolved in this Circuit." (*Id.* At p. 152.)

In *People v. Mattiace* (N.Y. Ct. App. 1990) 568 N.E.2d 1189, 1192-1193, the court (without citing any rule of evidence) observed, "Thus, 'in the circumstances of this case, where the defendant was the owner, chief stockholder and president of a small family business, which had been indicted as his codefendant in the commission of identical crimes, it was not error to admit [if defendant had taken the stand] certain convictions of the corporation to impeach the credibility of the defendant' [citation]. The potential use of [the corporation's] prior convictions to impeach the credibility of this defendant, who was jointly tried, is not erroneous as a matter of law. Evidence of [the corporation's] convictions could have been probative of defendant's credibility, had he testified, as an officer and owner of the corporation. It would not have been admitted to prove or bear on defendant's criminal propensity or sole responsibility for the corporate crimes but to affect his credibility and defensive explanations or deflections of responsibility. On the facts of this case, the ruling did not rise to an abuse of discretion as a matter of law (*see*, *People v. Brown* (1979) 48 N.Y.2d 921, 923, *supra; People v. Shields* (1978) 46 N.Y.2d 764).'" The dissent in *People v. Mattiace, supra,* 568 N.E.2d 1189, however, viewed the issue differently, explaining that "it is difficult to perceive how the mere fact that a corporation has been convicted of a crime has any bearing on a particular individual's credibility *without a further showing* linking the person to the criminal conduct underlying the conviction." (*Id.* at p. 1193.)

One commentator has written, "[u]sing corporate convictions to impeach witnesses at trial poses unique problems for courts. Unlike prior individual convictions, for prior corporate convictions, the witnesses may not be at all connected with the prior illegality. Thus, in assessing the impeachment value of a prior corporate conviction, a court must first determine whether it has any relevance at all. The connection between the prior corporate crime and the witness that will establish relevance may be either direct

or indirect. Direct linkage is when the witness was himself convicted or was an 'obviously guilty' party in the prior illegality. Indirect linkage is when the connection is established through a presumption based on the type of crime and witness involved and/or the corporation's personality. [¶] Establishing the connection between the prior corporate crime and the witness does not end a court's inquiry. It must then decide whether admitting the particular crime involved is on balance appropriate for the case at bar. This latter inquiry is similar though not identical for prior corporate and for individual convictions." (Friedlander, *supra*, 78 Cal.L.Rev. at p. 1339.) That commentator proposes that the "decision to allow a prior corporate conviction to attack the credibility of a witness rests in the sound discretion of the court. The conviction, however, must be relevant to the credibility of the witness. In addition, the probative value of admitting this evidence must outweigh its prejudicial effect." (*Id.* at p. 1338.)

Notwithstanding the authorities discussed, whether a corporate conviction can ever be used to impeach an individual witness in view of the language in Evidence Code section 788, is not clear. But the criminal conviction of the corporation could be admissible under Evidence Code section 1101, subdivision (b) if that conviction shows that the defendant on behalf of or in concert with the corporation "committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . .) other than his or her disposition to commit such an act." Here, defendants sought to admit the corporate conviction not only to impeach plaintiff but to show he committed a crime or act that was relevant to his knowledge.

It is undisputed that the only defendant in the Medi-Cal fraud case was the pharmacy—a corporation—and that the only party to the plea agreement with the State was that corporation. There was no evidence before the trial court that plaintiff committed a crime, personally engaged in any of the charged misconduct, or had any knowledge of such misconduct, much less that he ratified it. There was no showing that plaintiff committed a crime or other act covered by Evidence Code section 1101. Evidence Code section 788 could not apply. The evidence did not show that plaintiff had been convicted of a crime. And even if the plaintiff's involvement in the criminal

activity could result in the admission of the pharmacy's crime to impeach plaintiff, there was not a sufficient showing of such involvement. In any event, the trial court had justification for excluding the evidence under Evidence Code section 352. Evidence of the corporate conviction and evidence concerning defendant's involvement or lack of involvement with the charged misconduct would have increased the duration of the already lengthy trial. Under Evidence Code section 352, the trial court, in its discretion, could have determined that the probative value of the corporate conviction was outweighed by the potential prejudice, expenditure of time, and potential confusion of the jury that admission of the conviction could have caused. Accordingly, the trial court did not abuse its discretion by excluding from evidence the corporate conviction and plea agreement. [8]

C. Exclusion of Defendant's Proffered Testimony Regarding Plaintiff's Motive for Filing Suit

Defendants contend that the trial court erred when it excluded defendant's proferred testimony concerning plaintiff's motivation for filing this lawsuit against defendants. According to defendant, he was prepared to testify that plaintiff sued him because plaintiff was angry over the close relationship that had developed between defendant and plaintiff's son. The trial court, however, granted plaintiff's objections to that testimony on relevance, speculation, and hearsay grounds.

This issue arose during defendant's direct examination resulting in the following protracted colloquy between the trial court and counsel: "[Defendants' Counsel]: Have you ever met . . . [plaintiff's son]? [Defendant]: Yes, I did. [Defendants' Counsel]:

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[8] In support of their contentions concerning the exclusion of the plea agreement, defendants also assert arguments about the authenticity of a $474,404 check and the evidence showing that defendant changed his name. Those arguments, however, are asserted in support of defendants' contention that they were prejudiced by the order excluding evidence of the plea agreement. Because we have concluded that the trial court did not err in excluding evidence of the conviction, we do not reach defendants' assertions of prejudice.

Have you spent time with [plaintiff's son]? [Plaintiff's Counsel]: Relevance. The Court: Counsel, you want to come to side–bar and explain relevance? [Defendants' Counsel]: Sure. [Defendants' Counsel]: The relevance is this will be an argument that the reasons this lawsuit was filed was because of [defendant's] friendship with [plaintiff's son]. The Court: Since when does – is there anything, I mean, so what? [Plaintiff's Counsel]: That is my response. [Defendants' Counsel]: So that [plaintiff] got Mr. – so he filed a lawsuit because of [defendant's] friendship with [plaintiff's son]. The Court: I didn't hear that in your opening statement. [Defendants' Counsel]: I talked about that in my opening. The Court: I don't recall. [Plaintiff's Counsel]: I don't recall it, but I can't say one way or the other. But let me just say this: it doesn't matter what a person's motivation is to file a lawsuit. [¶] It matters whether the claims have merit. If he wants to do this because he hates the person, big deal, that is not relevant. What is relevant is whether his claims have merit. [¶] The Court: Why isn't that a persuasive argument defense? [¶] [Defendants' Counsel]: I think it is relevant, quite frankly. [¶] The Court: How does it go to the merits of any claim or defense? [¶] [Defendants' Counsel]: Well, the claims – our position is the claims are meritless and fraudulent, and it is our position that the [*sic*] this whole case is a vendetta by [plaintiff] against [defendant]. That will be one of our themes in this case. [¶] The Court: You haven't elicited a single scintilla of testimony, all the way up to this point in time, that would suggest that. [¶] [Defendants' Counsel]: I haven't had a chance to have [plaintiff] on the stand. [¶] . . . [¶] The question is why does that have any relevance, any tendency, in reason, to prove or disprove any fact which is of consequence to the determination of this action, which is the definition of relevance. [¶] [Defendants' Counsel]: It is our position that the claims asserted by [plaintiff] throughout this case are all based – are wrong, and lies, and fraudulent claims. And our position is that the reason this case is even going forward is because of the vendetta that [plaintiff] has against [defendant], in large part due to the relationship that [defendant] created with [plaintiff's] son. [¶] The Court: Just a minute, I haven't heard a scintilla of evidence out of [defendant's] mouth up to this point that would suggest that. [Defendant's Counsel]: Well, no one has asked him that until now,

your Honor. Plaintiff's counsel won't ask him that question. [¶] The Court: All I have heard from him, the only hostility that I have heard so far is [defendant's] hostility towards [plaintiff]. [¶] And when is this supposed to have arisen? [¶] [Defendant's Counsel]: And then they were friends again, and then in 2006, 2005-2006 timeframe, [defendant] became friends with [plaintiff's] son, and became very, very close. [¶] The Court: Is [plaintiff's] son on the witness list? [¶] [Defendant's Counsel]: No. [¶] [The Court]: So, you don't have – so he won't corroborate this, right? [¶] [Plaintiff's Counsel]: Can I ask a simple question? How could this witness know the state of mind of [plaintiff] as to why he filed the lawsuit beyond it being relevant, this witness? [¶] The Court: There is that point too. So what are you going to do? Will you have him speculate this was the reason? [¶] [Defendant' Counsel]: No. [¶] The Court: Is your guy going to testify, is [defendant] going to testify that [plaintiff] says I hate your guts because you're friends with my son, and that is why I am filing the lawsuit? [¶ [Defense Counsel]: That is the theme. [¶] The Court: No, that is not the answer to the question. That is not responsive to the question. Is your guy going to testify I – want a representation from you right now, is your guy going to testify that he ever heard [plaintiff] say that this was his motivation? [¶] [Defendants' Counsel]: I cannot say that right now. I would have to ask him. [¶] . . . [¶] The Court: How are you going to get your guy to say I was friends, I knew [plaintiff's] son, and then how do you make me an offer of proof? How do you connect the dots? [¶] [Defendants' Counsel]: I will ask [plaintiff] the same series of questions. [¶] The Court: How do you connect the dots? What is your guy going – this is – what is this witness going to testify? [¶] [Defendants' Counsel]: He will testify that he became friends with a troubled young man, and [plaintiff] is, his understanding that [plaintiff] got upset because he was getting close to [plaintiff's] son. [¶] The Court: And how did he reach that understanding? [¶] [Defendants' Counsel]: *Based on what he was told by the son.* [¶] The Court: That is hearsay. Not within any exception. [¶] [Defendants' Counsel]: *I will reserve this line of questioning until I can develop this with [plaintiff].* [¶] The Court: The objection is sustained." (Italics added.)

Plaintiff argues that by reserving this issue at the end of the foregoing colloquy, defendants waived or abandoned it by not raising it thereafter with the trial court. Although defendants' purported reservation of the issue, without then following up on it with the trial court, raises an arguable claim of forfeiture, we will assume that in the lengthy colloquy with the trial court and counsel, defendants adequately preserved the issue for appeal and address it on the merits.

The trial court's ruling on the admissibility of defendant's testimony concerning plaintiff's motivation for suing defendants is reviewed on appeal under an abuse of discretion standard of review. "On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence . . . ." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) As discussed above, to establish an abuse of discretion, the complaining party must show that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10; *People v. Carrington, supra,* 47 Cal.4th at p. 195.)

The trial court sustained the objection to defendant's proposed testimony on the grounds that plaintiff's motivation for filing suit against defendants was irrelevant to any issue in dispute, that defendant's testimony about plaintiff's state of mind was speculative, and that the out-of-court statement by plaintiff's son to defendant concerning plaintiff's motivation for filing suit was hearsay not subject to any exception. As discussed below, each of those grounds provided a reasonable basis upon which to exclude the proffered testimony.

The issues before the trial court largely concerned the existence or nonexistence of certain oral and written agreements between the parties and the circumstances surrounding the acquisition of a commercial property by Angelino Men's Wear. The agreements were allegedly made in the 1994, 1998, and 2002 time frames, and Angelino Men's Wear acquired the disputed commercial property in 2003. Plaintiff, however, did not file suit until 2006. Generally, a party's motive for bringing an action is irrelevant. (See *Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 519; *Smith v.*

Silvey (1983) 149 Cal.App.3d 400, 406.) Thus, it was not arbitrary, capricious, or patently absurd for the trial court to conclude that testimony about plaintiff's state of mind in 2006 was irrelevant to the existence of contracts and a purchase agreement allegedly entered into prior to that time.

Moreover, even if defendant's testimony was relevant, it was based upon defendant's subjective opinion concerning plaintiff's state of mind. Ordinarily, such speculation as to another's state of mind is inadmissible. (See *People v. Kimble* (1988) 44 Cal.3d 480, 498.) Consequently, it was not an abuse of discretion to exclude the testimony on the grounds it was inadmissible speculation.

And, even assuming defendant's testimony was not based on speculation, it was admittedly based on the out-of-court statement of plaintiff's son[9] and was being offered for the truth of the matter asserted therein. As such, it was hearsay, and defendant did not argue that any recognized exception to the hearsay rule applied. (See *In re Miranda* (2008) 43 Cal.4th 541, 574.) Therefore, the trial court did not abuse its discretion by excluding defendant's proffered testimony on hearsay grounds.

D. Admission of Testimony Regarding Income Taxes

Defendants contend that the trial court erred when it allowed plaintiff to question defendant and his tax accountant about the income tax returns of both defendant and Angelino Men's Wear. According to defendants, those returns were privileged from disclosure, and defendants did not voluntarily waive that privilege. In response, plaintiff maintains that defendants waived the privilege both during discovery and at trial.

In California, income tax returns are subject to a statutory privilege against disclosure, as well as a privacy right under the California Constitution which also protects them from disclosure. "The California Supreme Court has held that [former] Revenue and Taxation Code section 19282, which prohibits disclosure of tax returns, implicitly creates a privilege against the disclosure of income tax returns. (*Webb v. Standard Oil*

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[9] Plaintiff's son was not called to testify at trial.

Co. (1957) 49 Cal.2d 509, 513 [319 P.2d 621].)" (*Fortunato v. Superior Court* (2003) 114 Cal.App.4th 475, 479 (*Fortunato*).) And, "tax returns submitted to a bank with a loan application are not protected *solely* by the privilege enunciated by the California Supreme Court in *Webb v. Standard Oil Co*., *supra*, 49 Cal.2d 509. A bank customer reasonably expects the bank to maintain the confidentiality of private financial matters. (*Burrows v. Superior Court* (1974) 13 Cal.3d 238, 243 [118 Cal.Rptr. 166, 529 P.2d 590].) Although there is no 'bank-customer privilege akin to the lawyer-client privilege' or other statutory privileges, confidential financial information given to a bank by its customers is protected by the right to privacy that became a part of the California Constitution after the judicial formulation of the tax-return privilege. (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656 [125 Cal.Rptr. 553, 542 P.2d 977]; Cal. Const., art. I, § 1.) Thus, there is a right to privacy in confidential customer information *whatever* form it takes, whether that form be tax returns, checks, statements, or other account information. (See *ibid*.; *Schnabel v. Superior Court* [(1993)] 5 Cal.4th [704,] 712–713.)" (*Fortunato, supra*, 114 Cal.App.4th at pp. 480-481.)

But, both the tax return privilege and the Constitutional right to privacy can be waived. "The [tax return] privilege may be waived by an intentional relinquishment of it. (*Schnabel v. Superior Court*, [*supra*,] 5 Cal.4th [at p.] 721 [21 Cal.Rptr.2d 200, 254 P.2d 1117].)" (*Fortunato, supra,* 114 Cal.App.4th at p. 479.) "The waiver of both privileges and the constitutional right to privacy 'must be narrowly rather than expansively construed,' in order to protect the purposes of the privilege or right. (Citation.)" (*Id*. at p. 482.) Submitting a tax return with a loan or credit application or to a bank does not constitute a waiver of the privilege or right of privacy. (*Id.* at pp. 481-482.)

Defendants do not contest that during discovery plaintiff obtained defendant's personal tax returns and the returns of Angelino Men's Wear in response to a third-party subpoena to Alliance Bank—the bank from which defendant had obtained a loan to

purchase the disputed commercial property.[10] Nor do they contend that they objected to the production of those returns by the bank at the time the subpoena was served on the bank or at the time the bank produced the returns to plaintiff. Moreover, they concede that the returns were thereafter listed on an exhibit list *jointly* submitted to the trial court prior to trial, and they were not the subject of any of the motions in limine. Nevertheless, they erroneously contend that they did not voluntarily waive either the privilege or the right to privacy with regard to those returns because they objected to questions concerning them at trial.

At trial, defendants initially objected to defendant being questioned about the income tax returns, but ultimately withdrew those objections. Then defendants purported to reassert the objections. The trial court concluded there had been a waiver of any privilege or right of privacy, and defendant testified concerning the returns without further objections. Moreover, at the conclusion of testimony, counsel for defendants stated, "I have no objection to any of [their exhibits] coming in. . . ."

By allowing the bank to produce the returns during discovery without objection, defendants voluntarily waived any privilege or privacy right as to those returns. (See *Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1290 ["Privileges are preserved unless the holders fail to object in a proceeding where they have standing and the opportunity to claim them. (Evid. Code, § 912, subd. (a); see *International Ins. Co*. v. *Montrose Chemical Corp*. (1991) 231 Cal.App.3d 1367, 1373, fn. 4 [282 Cal.Rptr. 783]"]; see also 2 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 8:726, p. 8E-116; *Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal.App.4th 263, 272-274.) Moreover, by jointly listing the returns as exhibits, defendants implicitly acknowledged that plaintiff intended to introduce the returns at trial. Thus, defendants' subsequent, belated objections during trial were ineffective because defendants knowingly allowed the disclosure of the subject returns prior to trial,

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[10] Plaintiff contends that the tax returns were also produced without objection in response to a document demand. But nothing in the record substantiates that contention.

made no attempt to limit their use or dissemination by, for example, seeking a stipulation or protective order, and did not file a motion in limine prior to trial seeking to exclude the returns, despite their knowledge that plaintiff intended to introduce them.

That the disclosure was voluntary can be assumed because defendants do not challenge the regularity of the subpoena to the bank or the production by the bank on grounds of lack of notice or opportunity to object. The voluntariness of the disclosure is also confirmed by defendants' submission of a joint exhibit list that listed the returns as exhibits and suggests that defendants knew the returns were going to be used as exhibits at trial. Finally, defendants' withdrawal of their objections to and later acquiescence in the admission of the tax returns at trial also support the trial court's finding that defendants' voluntarily waived any privilege or privacy objections.

Defendants also challenge the admission of the testimony of defendants' tax accountant concerning the returns. But, there is nothing in the record demonstrating that defendants objected at trial to the accountant being questioned about the returns. Absent a showing that they preserved the issue in the trial court, defendants' challenge to the admission of the accountant's testimony is forfeited. (See *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264 ["The forfeiture rule generally applies in all civil and criminal proceedings"].) Accordingly, we affirm the trial court's admission of the tax returns and of testimony about them.

E. Misconduct

Defendants argue that the "gestalt"[11] of the trial was "skewed" in plaintiff's favor. They characterize the conduct of the trial as a "crucible" in which defendant was put on trial, while plaintiff was a "bystander." Specifically, defendants contend that plaintiff's counsel made "incessant objections" during the direct examination of defendant, such

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[11] Gestalt is defined as "a structure or configuration of physical, biological, or psychological phenomena so integrated as to constitute a functional unit with properties not derivable from its parts in summation." (Webster's 3d New Internat. Dict. (1981) at p. 952.)

that defendants' counsel was "never able to get to the meat of his examination." Defendants also complain that the trial court made negative comments about defendant and pressured defendants' counsel by placing time limits on his witness examinations and arguments, but did not similarly pressure plaintiff's counsel.

Reduced to its essence, defendants' "gestalt" argument appears to be an assertion of prejudicial misconduct on the part of both opposing counsel and the trial court, notwithstanding the absence of any objections on those grounds during the trial. Defendants attempt to support these assertions factually by presenting page totals of the parties' respective testimony, tallies of plaintiff's objections to defendant's direct testimony, and anecdotal quotes from both opposing counsel and the trial court. But they provide *no legal authority* to support their specific or general assertions of misconduct.

It is an appellant's burden on appeal to provide legal authority and analysis in support of each assertion raised on appeal. As one Court of Appeal recently explained, "[Appellant] fails to present any intelligible *legal argument* as to why the court's denial of the motion was reversible error. One cannot simply say the court erred, and leave it up to the appellate court to figure out why. (See *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545–546 [35 Cal.Rptr.2d 574] [appellate court need not furnish argument or search the record to ascertain whether there is support for appellant's contentions].) [¶] 'This court is not inclined to act as counsel for [the appellant] or any appellant and furnish a legal argument as to how the trial court's rulings in this regard constituted an abuse of discretion [citation], or a mistake of law." (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 (italics added); see also *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 434-436.)

Absent citation to authority and corresponding legal analysis, we are left to speculate as to the legal basis of the assertions of misconduct. For example, it is unclear whether defendants are contending that the trial court had a sua sponte duty to admonish plaintiff's counsel concerning his alleged "incessant" objections and, if so, at what point during the trial that duty arose. And, defendants provide no legal authority in support of any such sua sponte duty on the part of the trial court. Similarly, it is unclear whether

defendants are contending that the trial court abused its broad discretion to control the conduct of the trial by placing time limits on the witness examinations and arguments of defendants' counsel and, if so, what the authority is for that questionable proposition of abuse of discretion. And, given that no specific objections were made during trial to the claimed misconduct, it is unclear upon what basis defendants could be excused from making such objections. A generalized claim that the trial, when viewed in its entirety, was "unfair" is too vague an assertion for us to entertain on appeal absent compelling legal authority and analysis in support thereof. We therefore reject defendants' misconduct arguments.

DISPOSITION

The judgment is affirmed. Plaintiff is awarded costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.